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No. 04-1067

In The Supreme Court of the United States

STATE OF GEORGIA,

Petitioner,

v.

SCOTT FITZ RANDOLPH,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Georgia

REPLY BRIEF FOR PETITIONER

PAULA K. SMITH
Counsel of Record for Petitioner
Senior Assistant Attorney General

THURBERT E. BAKER
Attorney General

MARY BETH WESTMORELAND
Deputy Attorney General

Please serve:

PAULA K. SMITH
GEORGIA DEPARTMENT OF LAW
40 Capitol Square, S. W.
Atlanta, Georgia 30334-1300
(404) 656-3351

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONER

"[T]he search of property, without warrant and without probable cause, but with proper consent, is valid under the Fourth Amendment." *United States v. Matlock*, 415 U.S. 164, 165-66 (1974). Proper consent may be obtained "either from the individual whose property is searched . . . , or from a third party who possesses common authority over the premises." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).

The Georgia Supreme Court held that consent of one co-occupant to search a shared premises was valid only when the other occupant was absent, viewing the assumed risk that one co-occupant would permit police to search common areas as nothing more than an inability to control access to the premises during the other's absence. (Pet.App. 1, 3). The Court held that if the other occupant was present and able to object, police must obtain the other's consent as well. *Id.*

Respondent does not argue that the Georgia Supreme Court's view should be adopted or even defend that Court's position that police must obtain consent from all present co-occupants. Rather, Respondent would have this Court look solely to whether the consenter's co-occupant affirmatively objects and, if so, police may not enter the premises although an occupant with equal authority and control over the premises has given them permission to enter. In short, Respondent would have this Court adopt a rule which extinguishes the ability of a co-occupant with actual and equal authority over a shared premises to permit inspection of the common areas of that premises in her own right. Such a position cannot be reconciled with this

Court's decisions and general Fourth Amendment principles.

A. Respondent's "Voluntary Relinquishment" Theory Cannot Be Reconciled with This Court's Decisions Validating Third Party Consent Searches.

Consent searches are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). Consent must be freely and voluntarily given, with voluntariness being a question of fact to be determined from the totality of circumstances, and the Constitution does not require that the person giving consent knows that he or she has a right to refuse consent. *Id.* at 222-23, 248-49.

Based on the recognized utility and value of consent searches, in *Matlock* this Court reaffirmed that police are not limited to obtaining consent from only the suspect himself in order to enter and search the residence the suspect shares with another. Officers may validly act upon voluntary consent from the suspect's co-occupant if the latter has "common authority" over the premises, an authority derived not from property law but from "mutual use of the property by persons generally having joint access or control for most purposes. . . ." *Id.* at 171 n.7. From that mutual use, "it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id. Rodriguez* reaffirmed that principle and held that a warrantless entry is valid when based upon consent of a third party whom police reasonably believed, at the time of entry, had common

authority over the premises but who in fact did not. 497 U.S. at 179.

Respondent would limit *Matlock*'s rule of third party consent to his novel theory of "voluntary relinquishment" of control of the premises to other co-occupants, a "relinquishment" that purportedly occurs when the suspect is either absent from the premises or is present but does not affirmatively object before police enter to search based on permission from a co-occupant. Such a theory is belied by the facts of both *Matlock* and *Rodriguez*, as neither defendant "voluntarily relinquished" control of the premises: Matlock was arrested in the front yard and put in a police car while police asked the woman with whom he was living for consent, while Rodriguez was known to be asleep in the apartment when police entered with the consent of a woman whom police thought lived there. *Matlock*, 415 U.S. at 166; *Rodriguez*, 497 U.S. at 179. Neither defendant can fairly be said to have "voluntarily relinquished" control of the premises to other co-occupants.

Matlock validated a search based solely upon consent of the suspect's co-occupant, without any analysis of whether the suspect should have been asked to consent or had relinquished control of the premises. Rodriguez made clear that one element that can make the search of a person's "reasonable" is "the consent of the person or his cotenant." 497 U.S. at 183-84. In light of these holdings, it would be anomalous to conclude that the consent of a co-occupant, with equal access to and authority over a premises, becomes "unreasonable" under Fourth Amendment principles merely because the suspect or target of the search refuses consent.

The consenter's authority over the premises does not wax or wane simply because other occupants are present, as "the relevant analysis focuses on the relationship between the consenter and the property searched, not the relationship between the consenter and the defendant." *United States v. McAlpine*, 919 F.2d 1461, 1464 (10th Cir. 1990). In particular, the authority of a "third party" such as Mrs. Randolph over their marital home did not increase or lessen with Randolph's presence, as her mutual use of the property and her access over the common areas remained the same, regardless of where he was. As the trial court found, she had "common authority to grant consent for police to search the marital home" and was "fully competent" to grant consent to search. (J.A. 23).

B. Respondent's Expectations of "Absolute Control" Over Shared Premises Are Unreasonable.

The flaw in Respondent's "voluntarily relinquishment" theory is that it assumes that when the defendant or suspect is at home, he is in total control of the premises and all other occupants always accede to his wishes. Under his "voluntary relinquishment" theory, the other co-occupants' rights in and authority over the shared premises are only triggered when he is away or, if he is present, he does not object to a search. Such expectations of absolute control over shared property are not "reasonable" and should not be enshrined in the Fourth Amendment.

Rodriguez, *Matlock* and *Frazier v. Cupp*, 394 U.S. 731, 740 (1969), all recognize the reduced expectations of privacy in property shared with another and that those reduced expectations reasonably include the risk that a co-occupant will allow someone to enter the premises, even if

the defendant does not consent. "Although there is always the fond hope that a co-occupant will follow one's known wishes, the risks remain." *United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995).

Police have long been allowed to proceed on the basis of "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Police may reasonably assume that a husband and wife mutually use the common areas of their home and have joint access to them. *United States v. Whitfield*, 939 F.2d 1071, 1074 (D.C. Cir. 1991).

Respondent would have this Court hold, however, that is unreasonable for police to ask for consent to search from a co-occupant such as the wife if her husband has refused consent. While Respondent mischaracterizes Petitioner's position as giving a wife such as Mrs. Randolph "superior" rights or control over the couple's marital home, it is Respondent who is asserting a position that would give him total control over a shared residence, notwithstanding his wife's desire to admit police into their shared residence. Respondent's position is nothing more than a thinly-veiled call for a return to the day when the man was *the* king of the castle and no one else in the home had any rights or legal standing.

C. "Common Authority" Is Measured by an Objective Standard.

Respondent also mischaracterizes Petitioner's position as asserting that anyone with "common authority" over the premises, including minor children or landlords, could give police valid consent. In actuality, it is with *Matlock*'s

definition of "common authority" that Respondent takes issue, as Petitioner's position is based squarely on *Matlock* and *Matlock* established that the authority which justifies third party consent rests on "mutual use of the property by having joint access or control for most purposes. . . ." *Matlock*, 415 U.S. at 171 n.7.

Both *Rodriguez*, 475 U.S. at 188, and *Stoner v. California*, 376 U.S. 483 (1964), made clear that police may not always accept each person's invitation to enter a premises. Instead, an invitation to enter must be analyzed under an objective standard to determine if the facts available to the officer at the moment would warrant a reasonable man to believe the consenting party had authority over the premises. *Rodriguez*, 497 U.S. at 188 (cits. and quotes omitted). If the situation appears ambiguous, police have a duty to make further inquiry.[1] *Rodriguez*, 497 U.S. at 188-89; *United States v. Whitfield*, 939 F.2d at 1075. Respondent errs in relying on *Stoner* and *Chapman v. United States*, 365 U.S. 610 (1961): the Court refused to give effect to the consent given by the respective hotel clerk and landlord because they lacked "common authority" over the premises for purposes of triggering the *Matlock* rule.

One who has equal access to and control over a premises should be able to give police permission to search that premises in his or her own right if that permission is

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[1] In a situation involving a minor child, additional factors such as the minor's age, address, right of access and right of invitation could be ascertained in order to establish the minor's relationship to the premises and show whether the minor has "common authority," to give valid consent to search. *See, e.g., Brooks v. State*, 262 Ga. 578, 580(1), 422 S.E.2d 546 (1992). The need for and content of such additional inquiry to minors are not questions raised or decided below.

voluntary. The occupant giving consent is not waiving any one else's rights, as Respondent asserts, but is simply granting access to search the areas she shares with others.

D. Common Law Did Not Permit a Co-Tenant to Exclude the Guest of Another Co-Tenant.

To the extent that Respondent and his Amicus rely on property and common law concepts to assert that Respondent's objection to the search trumps his wife's consent, such reliance is misplaced. Under property concepts, "co-tenants are entitled to full enjoyment of the joint property, and are not allowed to exclude the other co-tenants from it." *Morning*, 64 F.3d at 536 n.6. In addition, each co-tenant could license his or her rights in the property to a third party, and the third party could use the property to the same extent as the party who gave the license. *See, e.g., Rawson v. Morse*, 21 Mass. 127, 133-34 (1826); 62 C.J. *Tenancy in Common* § 222(3) (1933). One co-tenant therefore could not exclude a third party who had been licensed by another co-tenant. *See* 86 C.J.S. *Tenancy in Common* § 135 (1997); 62 C.J. *Tenancy in Common* § 222; *McGarrell v. Murphy*, 1 Hilt. 132 (N.Y.Ct.Comm.Pl. 1856). Because one co-tenant had no right to – and was not permitted to – exclude a third party who entered the premises with authority from another co-tenant, it necessarily follows that a co-tenant's objection to an entry made no difference under the common law.

The case relied on by Respondent's Amicus, *Richey v. Brown*, 568 Mich. 435 (1885), (NACDL Br. 17-18), involved consent given to the third party by a minor; when the minor's mother thereafter learned of the invitation and notified the third party not to enter the premises, the

court held that the third party was barred from continuing to enter the premises with the unlawful purpose of taking timber without paying for it. This decision is easily reconciled with *Matlock* as, cutting through the labels, the minor did not have sufficient authority over the premises to give valid consent.[2]

E. Consent Searches Authorized by Occupants with Equal Access and Control Over Shared Premises Serve Valid Societal Interests.

The overriding consideration that Respondent overlooks in this case is that Mrs. Randolph was trying to report a crime occurring in her house. Police did not create the controversy by simply appearing at the door and asking for general consent to search the couple's residence. She had called police to the residence after her husband absconded with their child and, in the course of relaying events, told police about her husband's drug use. (Pet.App. 7-8). She cooperated with police and led them upstairs to the bedroom where the cut straw with its white residue was in plain view on a dresser. (Pet.App. 8).[3]

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[2] Respondent's Amicus relies on a sentence from a treatise (NACDL Br. 17), but that sentence by its own terms reflects the treatise author's view of what the rule should be rather than what it was, and the treatise does not cite decisions or authority supporting that view.

[3] Respondent never argued at the suppression hearing that his wife did not have sufficient authority over the bedroom to give consent to enter, nor was this factual question presented to or decided by any Georgia court. As noted, the trial court found she had "common authority to grant consent for police to search the marital home." (J.A. 23). The question presented to the Georgia Supreme Court was the "situation in which two persons have equal use and control of the premises to be searched." (Pet.App. 1). Respondent never objected to the

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Under the rule proposed by Respondent, one occupant of a residence would not be able to cooperate with police by consenting to a search that would reveal criminal activity conducted in her home by another occupant. Instead, the other occupant's refusal to search would automatically trump her own consent and extinguish her ability to exercise dominion and control over her own house. This was not simply Randolph's house. This was their house. Respondent's asserted interests in promoting marital harmony, in preferring that police seek a warrant, and in how a co-occupant could supply evidence for a warrant were all equally at play in *Matlock*. In short, Respondent's arguments are against the result reached in *Matlock* itself.

Schneckloth discussed at length the salutary effects of consent searches, noting that they are valuable in situations where police have some evidence of illicit activity but do not have probable cause to arrest or search, so that this may be the only means by which to obtain reliable and important evidence; and that even when police have probable cause, consent searches may be more convenient and, if fruitless, lead police to conclude that an arrest is not necessary and avoid its stigma and embarrassment. *Schneckloth*, 412 U.S. at 227-28. This Court also noted a community's genuine interest in encouraging consent, as the search that ensued could yield the evidence needed to solve and prosecute a crime and prevent an innocent person from being wrongly charged. *Id.* at 243.

Co-occupants such as Mrs. Randolph have a valid interest in having crimes occurring in one's own house

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framing of the question on which this Court granted review and should not now be heard to reformulate the issue.

detected. If she has reason to suspect that her spouse is conducting some illegal activity in their shared space, she should have the right to consent to a search of that shared space, regardless of any objection by her spouse. She has a legitimate interest in giving consent which could lead to the discovery of contraband and not only distance herself from a potential charge of possession based on an equal access or party to a crime theory, but rid her home of contraband that might be a danger to someone such as her child. These important societal interests are not only frustrated by, but become invisible under Respondent's proposed rule.

CONCLUSION

WHEREFORE, the State of Georgia prays that the decision of the state appellate court be reversed and that a rule be adopted which makes one co-occupant's voluntary permission sufficient to authorize a warrantless search.

Respectfully submitted,

THURBERT E. BAKER
Attorney General

MARY BETH WESTMORELAND
Deputy Attorney General

PAULA K. SMITH
Senior Assistant Attorney General

Please serve:

PAULA K. SMITH
Senior Assistant Attorney General
Georgia Department of Law
40 Capitol Square, S. W.
Atlanta, Georgia 30334-1300
(404) 656-3351